



Export Control Reform:
Fulfilling the Promise
UPDATE
CONFERENCE ON EXPORT CONTROLS AND POLICY

Export Control Reform: Transition Issues

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Transition Issues – BIS Perspective

- Delayed effective date of final rules
- Prior Commodity Jurisdiction determinations
- Grandfathering DDTC approvals
- BIS authorizations: NLR, license exceptions, and licenses
- DDTC § 120.5(b) approvals

Delayed Effective Date

- Final rules moving items from USML to CCL will have 180-day delay in effective date
- Effective date for USML Categories VIII and XIX and ECCNs 9Y610 and 9Y619 will be October 15, 2013
- Effective date for USML Categories VI, VII, XIII, and XX, and ECCNs 0Y606, 0Y617, 8Y609, and 8Y620 will be January 6, 2014



Commodity Jurisdiction Determinations

- Removed proposed .y.99 paragraphs in 600 series
- Added CJ guidance to General Order No. 5
 - If CJ determined to be subject to EAR and not identified at that time on the CCL = EAR99 (unless later enumerated on the CCL or USML)
 - If CJ determined to be subject to EAR and not identified at that time in a -018 ECCN = not 600 series



Transition Options

- Transactions authorized prior to effective date
 - Grandfather existing DDTC licenses, agreements, or other approvals beyond effective date of final rule per DDTC transition plan
 - Maintain DDTC approval until effective date but pre-position BIS license application or utilize license exception or NLR designation upon effective date



Transition Options

- Transactions after effective date
 - Obtain BIS license, use license exception, or use NLR designation when eligible
 - Obtain DDTC license, agreement, or other approval if eligible under § 120.5(b) of the ITAR



Grandfathering DDTC Approvals

- General Order No. 5 allows for continued use of DDTC approvals for items subject to the EAR if in accordance with DDTC's transition plan
- After applicable effective date, if choose to utilize BIS authorization rather than DDTC approval, must terminate the DDTC approval before using BIS authorization



Grandfathering DDTC Approvals

	Contains only items transitioning to CCL	Contains both transitioning and non-transitioning items
DSP-5	May use for up to 2 years after effective date of transition unless license expires or returned. May amend after effective date on case-by-case basis.	Valid for all items until expiration. May amend after effective date on case-by-case basis.
DSP-61 DSP-73	Valid until expiration. May amend after effective date on case-by-case basis.	
TAA MLA WDA	May use for up to 2 years after effective date of transition unless agreement expires. May amend after effective date on case-by-case basis.	May use for up to 2 years after effective date of transition unless agreement expires. Agreement may be kept valid beyond the 2-year period by submitting amendment to authorize transitioning items under § 120.5(b).

See DDTC's transition plan for full details.



Future BIS Authorizations

- No License Required (NLR)
 - Exports/reexports to Canada of 600 series items currently proposed or finalized
 - Exports/reexports of .y 600 series items to all destinations, except Country Group E:1 and China

Assumes no part 744 license requirements apply.



Future BIS Authorizations

- License Exceptions for 600 series items
 - April 16, 2013 final rule limited use to: LVS, TMP, RPL, GOV, and TSU
 - June 7, 2012 rule (Category X) proposed to add BAG for certain personal protective equipment
 - Main restrictions on using license exceptions with 600 series in § 740.2(a)(12)-(16)
 - Additional restrictions in § 740.2



Future BIS Authorizations

- Licenses
 - Free applications through SNAP-R
 - May “pre-position” applications prior to effective date of applicable final rule
 - Do not have to terminate current or grandfathered DDTC approval prior to applying for license
 - Cite prior equivalent DDTC approvals in application



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Future DDTC § 120.5(b) Approval

- Public comments expressed concern about “dual licensing”
- DDTC may license items subject to the EAR pursuant to Executive Order 13637
 - § 734.3(e) of the EAR
 - §§ 120.5(b), 120.42, 123.1(b), and 123.9(b) of the ITAR



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Future DDTC § 120.5(b) Approval

- Items subject to the EAR that are licensed under § 120.5(b) remain subject to the EAR
- Future transfers not covered by the ITAR approval will require BIS authorization for items subject to the EAR
- Potential violations pertaining to the use of § 120.5(b) may result in voluntary disclosures to both DDTC and BIS



Future DDTC § 120.5(b) Approval

- Items subject to the EAR:
 - Must be included with items subject to the ITAR in the purchase documentation
 - Must be for use in or with the items subject to the ITAR that are proposed for export or reexport
 - Illustrative list of examples – 78 Fed. Reg. 22664
 - Must be enumerated in the DDTC license application under the USML “(x)” paragraph
 - Must be classified (i.e., appropriate ECCN or EAR99 designation), and such classification must be provided to end user and consignees



Transition Issues – DDTC Perspective

- Transition period
- Status of currently approved and pending authorizations
- Retransfer and reexport authorizations
- Authorizations during transition
- Future submissions
- Status of previously issued CJ determinations
- Jurisdiction of violations



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Transition Period

- 180-day transition period
 - Allow industry to evaluate products and pending shipments
 - Foreign recipient review of inventory
 - Government updates to IT systems
- First removals to be effective October
- Same transition period for all removals



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Currently Approved and Pending Authorizations

- DSP-5s with all items transitioning to the CCL = valid for two years
- DSP-5s with some items transitioning to the CCL and some remaining on the USML = valid until expiration
- DSP-73s and DSP-61s will remain valid until expiration regardless of transitioning status of commodities



Currently Approved and Pending Authorizations

- Agreements (AGs) with all items transitioning to the CCL = valid for two years
- AGs still required for the provision of a defense service must be amended to re-scope
- AGs with some items transitioning to the CCL and some remaining on the USML = valid until expiration with an amendment to identify (x) paragraph



Reexport/Retransfer Authorizations

- Previously authorized remain valid under three scenarios:
 - Program status DSP-5
 - Sales/distribution territory of a MLA or WDA where the AG is the authority
 - Approval pursuant to ITAR § 123.9
- New requests must be submitted to the agency with jurisdiction at the time of the request



During Transition Period

- Applications received by State will be adjudicated as normal
- Commerce will “pre-position” license for commodities not yet transitioned to ensure minimal disruption on the first day of transition



Future Submissions

- Concern over “dual licensing”
- EO 13637 established a delegation of authority for State to license items “subject to the EAR”
- Identified in paragraph (x) of each revised USML category
- Conforming changes:
 - ITAR §120.5
 - ITAR §120.42
 - ITAR §123.1(b)
 - ITAR §123.9(b)
 - EAR §734.3(e)



ITAR § 120.42

Subject to the Export Administration Regulations (EAR): Items “subject to the EAR” are those items listed on the Commerce Control List in part 774 of the EAR and all other items that meet the definition of that term in accordance with §734.3 of the EAR. The EAR is found at 15 CFR parts 730 through 774.



Paragraph (x)

(x) Commodities, software, and technical data subject to the EAR (see §120.42 of this subchapter) used in or with defense articles controlled in this category.

Note to paragraph (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (see §123.1(b) of this subchapter).



ITAR § 123.1(b)

- (1) The purchase documentation (*e.g.*, purchase order, contract, letter of intent, or other appropriate documentation) includes both defense articles enumerated on the U.S. Munitions List and items on the Commerce Control List;
- (2) The commodities, software, and technical data subject to the EAR are for end-use in or with the U.S. Munitions List defense article(s) proposed for export; and
- (3) The license application separately enumerates the commodities, software, and technical data subject to the EAR in a U.S. Munitions List “(x)” paragraph entry



ITAR § 123.9(b)

(2) when exporting items subject to the EAR (see §§120.42 and 123.1(b)) on a Department of State license or other approval, the U.S. exporter must provide to the end-user and consignees in the purchase documentation or other support documentation the appropriate EAR classification information for each item exported pursuant to a U.S. Munitions List “(x)” paragraph. This includes the appropriate ECCN or EAR99 designation.



CJ Determinations

- CJs which determined a commodity to be subject to the EAR remain valid
- CJs which determined a commodity to be USML may be superseded by the list revisions
 - Exporters must review the new control lists starting with the USML and then working through the order of review to determine jurisdiction
- State will not issue revised CJ determination letters for items that have transitioned to the CCL
- CJs are specific to the commodity identified in the determination letter



Handling of Violations

- Parties must be cognizant of various factors to determine which agency needs to be informed of a violation:
 - Authorization used for the initial export and continued activity, if applicable
 - Jurisdiction of the commodity at the time of the concerned transaction
 - Appropriate licensing mechanism for the concerned transaction
- It is possible to need to report a violation to both State and Commerce

